

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL - SECOND DIST.

FILED

JAN 19 2010

KWANG-HO LEE et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA BOARD OF
ACCOUNTANCY,

Defendant and Respondent.

B221561

(Super. Ct. No. BS121343)

(David P. Yaffe, Judge)

JOSEPH A. LANE

Clerk

E. AMOS

Deputy Clerk

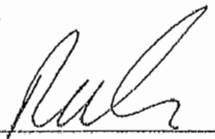
STAY ORDER

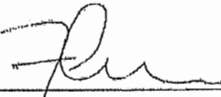
THE COURT:

We have read and considered the petition for writ of supersedeas and request for stay filed by appellants on January 12, 2010.

Respondent's June 4, 2009 decision revoking appellants' licenses is temporarily stayed, pending further order of this court. The temporary stay shall have the same restrictions as were imposed by the trial court in its stay order of June 26, 2009.

Respondent is requested to serve and file an opposition to the petition on or before January 29, 2010. (See Cal. Rules of Court, rule 8.112(b)(3).) Appellant may serve and file a reply on or before February 5, 2010.


RUBIN, Acting P.J.


FLIER, J.


BIGELOW, J.

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COURT OF APPEAL, SECOND DISTRICT

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FEB 10 2010

ORDER

JOSEPH A. LANE

Clerk

Deputy Clerk

THE COURT:

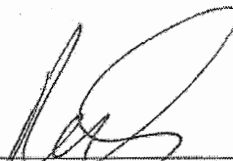
We have read and considered the petition for writ of supersedeas and request for a stay filed by appellants on January 12, 2010. We have also read and considered respondent's opposition filed on January 27, 2010, and appellants' reply filed on February 5, 2010.

Pending disposition of the instant appeal and further order of this court, respondent's June 4, 2009 decision revoking appellants' licenses shall be stayed. The stay shall have the same restrictions as were imposed by the trial court in its stay order of June 26, 2009.

Our temporary stay order issued on January 19, 2010 is vacated.



BIGELOW, P.J.



RUBIN, J.



FLIER, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KWANG-HO LEE et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA BOARD OF
ACCOUNTANCY,

Defendant and Respondent.

B221561

(Los Angeles County
Super. Ct. No. BS121343)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David P. Yaffe, Judge. Affirmed.

Fredrick M. Ray for Plaintiffs and Appellants.

Edmund G. Brown, Jr., Kamala D. Harris, Attorneys General, Alfredo Terrazas,
Assistant Attorney General, Karen B. Chappelle and Rene Judkiewickz, Deputy
Attorneys General, for Defendant and Respondent.

* * * * *

In this case, the California Board of Accountancy (Board) revoked appellant Kwang-Ho Lee's certified public accountant license and appellant Kenny H. Lee CPA Group, Inc.'s (KHL) certified public accountancy corporation license. Appellants challenged the Board's penalty in a petition for writ of mandate, which the trial court denied. On appeal, appellants argue that the trial court applied the incorrect standard of review and the Board's penalty was a manifest abuse of discretion. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 13, 1993, the Board issued certified public accountant certificate No. 64155 to Lee, and on October 31, 2002, the Board issued certified public accountancy corporation certificate No. 5185 to KHL. Lee owned KHL. The Board's executive officer filed an accusation against Lee and KHL on February 4, 2008, and, a first amended accusation on August 6, 2008. The Board alleged appellants committed acts of gross negligence, failed to maintain independence when performing auditing services, and failed to report discipline by the Public Company Accounting Oversight Board (PCAOB).¹ At a hearing before administrative law judge (ALJ) Daniel Juarez, appellants did not dispute the allegations in the accusation, and Lee apologized for the misconduct. Appellants presented several character witnesses, and their counsel argued that the ALJ should impose a reduced penalty.

1. Factual Findings

The ALJ made the following findings, and the Board adopted them.

A. Estate Tax Return

Lee misinformed his client Yvonne Ashford that she had to file a federal tax form in connection with her deceased mother's estate. The form was unnecessary because of the small size of the estate. At the administrative hearing, Lee acknowledged the federal

¹ The Sarbanes-Oxley Act of 2002 established the PCAOB. (15 U.S.C. § 7211.)

tax form was unnecessary. Lee did not dispute that his advice to Ashford constituted gross negligence.

B. PCAOB Disciplinary Action

In November 2005, the PCAOB found that appellants violated PCAOB rules in auditing GSL Holdings, Inc. (GSL) and Axesstel Corporation (Axesstel). The PCAOB revoked KHL's registration and barred Lee from working at a registered public accounting firm. Lee did not report the PCAOB disciplinary action to the Board, and he did not dispute the Board's allegation that he failed to timely report the disciplinary action.

C. GSL Audit

In 2003 and 2004, appellants were hired as GSL's independent auditor. In connection with that audit, appellants "'failed to exercise due professional care, failed to exercise professional skepticism, and failed to obtain sufficient competent evidential matter' in its work for GSL." Lee did not dispute that his conduct with respect to GSL violated several generally accepted auditing standards and the Accountancy Act (Bus. & Prof. Code, § 5000 et seq.).² Lee did not dispute that his conduct with respect to GSL constituted gross negligence.

D. Axesstel Audit

Lee worked as Axesstel's independent auditor beginning in 2003. While engaged as an independent auditor, Lee agreed to serve on Axesstel's board of directors. Lee failed to perform audit procedures necessary "to afford a reasonable basis for an opinion" and instead relied on Axesstel's management's representations. Lee did not dispute that his conduct violated several generally accepted auditing standards and the Accountancy Act. Lee did not dispute that his audit of Axesstel and his lack of independence from Axesstel constituted gross negligence.

² Undesignated statutory citations are to the Business and Professions Code, unless otherwise stated.

2. Legal Conclusions

The ALJ found, and the Board adopted the following legal conclusions:

“1. Cause exists to revoke or suspend [appellants’] license[s] . . . pursuant to . . . section 5100, subdivision (c), for acts of unprofessional conduct constituting gross negligence”

Section 5100, subdivision (c) provides: after notice and hearing the Board may revoke a permit or certificate for “[d]ishonesty, fraud, gross negligence, or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards that indicate a lack of competency in the practice of public accountancy”

“2. Cause exists to revoke or suspend [appellants’] license[s] . . . pursuant to . . . section 5100, subdivision (l), for the discipline imposed by the PCAOB”

Section 5100, subdivision (l) provides: after notice and a hearing the Board may revoke a permit or certificate for the “imposition of any discipline, penalty, or sanction on a registered public accounting firm or any associated person of such firm, or both, or on any other holder of a permit, certificate, license, or other authority to practice in this state, by the [PCAOB] or the United States Securities and Exchange Commission, or their designees under the Sarbanes-Oxley Act of 2002 or other federal legislation.”

“6. Cause exists to revoke or suspend [appellants’] license[s] . . . pursuant to . . . section 5063, subdivision (a)(2), for failing to report the PCAOB’s discipline against them”

Section 5063, subdivision (a)(2) provides: “A licensee shall report to the board in writing of the occurrence of any of the following events occurring on or after January 1, 1997, within 30 days of the date the licensee has knowledge of these events: [¶] . . . [¶] (2) The cancellation, revocation, or suspension of a certificate, other authority to practice or refusal to renew a certificate or other authority to practice as a certified public accountant or a public accountant, by any other state or foreign country.”

“9. Cause exists to revoke or suspend [appellants’] license[s] . . . pursuant to California Code of Regulations, title 16, section 65, for failing to maintain auditor independence”

California Code of Regulations, title 16, section 65 provides: “A licensee shall be independent in the performance of services in accordance with professional standards.”

3. *Penalty*

The ALJ rejected appellants’ argument that the misconduct occurred in isolated incidents stating that “these three clients [Ashford, GSL, and Axesstel] encompassed separate activities in more than one year. Furthermore, [appellants’] actions were significant departures from generally accepted accounting principles, and the PCAOB’s order constituted serious disciplinary action, demonstrating the serious nature of [appellants’] actions. . . . Lee should have exercised professional responsibility, by acknowledging his lack of experience and refused the work in the case of these three clients, or acquired the services of a properly experienced and qualified professional to assist him in those matters.”

Nevertheless, the ALJ concluded that appellants acted ignorantly and “with little professional regard for the needed experience to properly perform the accountancy acts for which they had been engaged.” The ALJ emphasized that appellants did not act fraudulently, finding that the absence of fraud justified a penalty less severe than license revocation. The ALJ noted that appellants cooperated with the Board, that time had passed since their misconduct, and that Lee had a 15-year career as an accountant. The ALJ recommended a 30-day suspension and a five-year period of probation.

After notifying Lee of its nonadoption of the ALJ’s decision and allowing Lee the opportunity to present written argument, the Board concluded that the above-summarized legal conclusions 1, 2, 6, and 9 separately and collectively warranted revocation of appellants’ licenses. The Board otherwise adopted the findings and legal conclusions of the ALJ, but imposed a harsher penalty.

4. Petition for Writ of Mandate and Trial Court Findings

Appellants petitioned for a writ of mandate, arguing that (1) the Board's decision revoking appellants' licenses was flawed because it did not contain sufficient foundation as required by *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 and (2) revoking appellants' licenses constituted a manifest abuse of discretion. Appellants requested the trial court "set aside the penalty of revocation and remand the case to the Board with instructions to impose the penalty of probation on such specific terms as the Board may deem appropriate."

The court denied the petition. It noted that the Board properly adopted all of the factual findings and legal conclusions made by the ALJ but increased the penalty. The trial court further concluded that the Board's express references to legal conclusions 1, 2, 6, and 9 explained the basis for the Board's decision. Applying a deferential abuse of discretion standard of review, the trial court found no error in the Board's penalty. Judgment was entered on January 4, 2010. This court stayed the Board's decision revoking appellants' licenses pending the resolution of this appeal.

DISCUSSION

On appeal, appellants argue that the trial court should have applied an independent judgment standard of review instead of a more deferential abuse of discretion standard of review. Appellants also argue that the revocation of their licenses constituted an abuse of discretion. We conclude neither argument has merit.

1. The Trial Court Applied the Proper Standard of Review

"Although the trial court is required to reweigh the evidence supporting the finding of misconduct, it may not exercise its independent judgment when reviewing the penalty. 'When the superior court has conducted its review and has concluded that the agency properly found misconduct, the imposition of the appropriate penalty for that misconduct is left to the sound discretion of the agency. "The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated." [Citation.]' [Citation.] An appellate court must sustain the

trial court's findings of misconduct if they are supported by substantial evidence, and it will not disturb the penalty imposed "unless it is shown to have been a manifest abuse of discretion." [Citation.] [Citation.] "[A]dministrative boards and officers" "are vested with a high discretion and its abuse must appear very clearly before the courts will interfere." [Citation.]" (*Spanner v. Rancho Santiago Community College Dist.* (2004) 119 Cal.App.4th 584, 591; see also *Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966 ["the propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency and its discretion may not be disturbed unless there has been a manifest abuse of discretion"].)

In their request for writ of mandate, the only disputed question was whether the penalty imposed by the Board was appropriate. The relief appellants sought requested the trial court "set aside the penalty of revocation and remand the case to the Board with instructions to impose the penalty of probation on such specific terms as the Board may deem appropriate." The trial court correctly concluded that the appropriate standard of review was abuse of discretion as that is the only standard applicable to a challenge to the penalty imposed by an administrative agency. (*Spanner v. Rancho Santiago Community College Dist.*, *supra*, 119 Cal.App.4th at p. 591.)

Even if the trial court should have independently considered the findings of misconduct, it would have been required to conclude that the misconduct was supported by evidence including Lee's admissions.³ Because the underlying misconduct was undisputed there was no evidence to reweigh in reviewing the Board's findings of

³ Witnesses testifying against appellants included Yvonne Ashford and Paul Fisher, an investigative certified public accountant for the Board. Fisher testified that Lee's advice to Ashford was an extreme departure from professional standards. He testified that Lee's conduct with respect to GSL was gross negligence because it was a major deviation from accounting standards. Fisher explained that Lee's lack of independence in dealing with Axesstel was an extreme departure from accepted standards constituting gross negligence and that his work for Axesstel also constituted gross negligence. As noted, appellants did not challenge Fisher's conclusions of gross negligence.

misconduct. Appellants neither disputed that they committed misconduct nor that their misconduct amounted to gross negligence, violations of generally accepted accounting standards, and violations of the Accounting Act. Indeed, in their petition, appellants stated that they filed an unnecessary form regarding Ashford's mother's estate. They acknowledged they "failed to utilize adequate audit procedures to scrutinize [the GSL] assets and failed to make proper reporting and disclosures in the audit." With respect to Axesstel, appellants conceded that they "failed to employ adequate auditing standards to question whether amounts on a restatement were fairly reported [and] Lee accepted an offer to serve on Axesstel's board of directors, thereby failing to maintain his independence as the corporation's auditor." Appellants admitted that they "did not report the investigation by the PCAOB . . . as required."

There is no merit to appellants' remaining claim that this court should remand the case to the trial court to exercise its independent judgment. That would be futile because appellants admitted all of the alleged acts of misconduct. Remanding the case to the trial court may be necessary in a case in which a petitioner contends that the administrative findings of misconduct were not supported by the evidence. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 311, 318.) In contrast, here it was conceded that the evidence supported the alleged misconduct.⁴

2. No Abuse of Discretion

Appellants correctly recognize that a Board may adopt the findings of an administrative law judge but impose a harsher penalty. (*Alford v. Department of Motor Vehicles* (2000) 79 Cal.App.4th 560, 568-569 [agency may adopt findings of

⁴ The bare assertion in appellants' petition that the "decision by the Board is not supported by the evidence presented and received at the administrative hearing" does not show appellants challenged the findings in the administrative decision. Appellants never identified any finding, other than the penalty that they purported to claim was unsupported. No argument in appellants' opening brief addresses the sufficiency of the Board's findings, except for the penalty. In any event, as explained, appellants admitted the relevant facts, and therefore any challenge to the underlying misconduct necessarily lacks merit.

administrative law judge but decide that penalty should be more severe].) They argue, however, that such conduct was inappropriate in this case because the ALJ, in a finding adopted by the Board, stated that although appellants' actions were serious, revocation of their licenses was unwarranted.

At most, appellants have shown that the Board's decision is not a model of clarity; they fail to show that the Board's penalty constituted an abuse of discretion. The Board's decision should have expressly rejected the ALJ's finding that revocation of appellants' licenses was unwarranted. Nevertheless, the only reasonable understanding of the Board's opinion is that it rejected that finding because it imposed a different penalty. One incongruous sentence in the Board's decision does not show the Board's penalty constituted an abuse of discretion.

"Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed." (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580.) The Board's express reasons for the penalty – appellants' violations of Business and Professions Code sections 5100, 5063, and California Code of Regulations, title 16, section 65 – were sufficient to support the Board's order. (Bus. & Prof. Code, § 5100, subd. (c).) Indeed one instance of gross negligence would have been a sufficient basis for the Board's order. (*Ibid.*) Here, appellants admitted to multiple instances of gross negligence. Appellants therefore fail to show the Board abused its discretion in revoking their licenses for this misconduct, notwithstanding the ALJ concluded only a lesser penalty was warranted. (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692 [“The fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion.” [Citation.]”].)

Finally, appellants' reliance on *Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d 506 is misplaced. In that case, the court stated that “the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” (*Id.* at p. 515.)

Here, the Board's decision was sufficient to "bridge the analytic gap," as it adopted the findings and legal conclusions made by the ALJ, which thoroughly described the evidence and the violations. (See *McBride v. California Bd. of Accountancy* (2005) 130 Cal.App.4th 518, 532 [thorough decision linking evidence to decision clearly bridged analytic gap].) The Board further explained that it determined revocation of the licenses was a proper penalty based on appellants' uncontested violations of sections 5100, 5063, and California Code of Regulations, title 16, section 65 (legal conclusions 1, 2, 6, and 9). The factual findings, legal conclusions, and basis for the order are explicit (and except for the penalty undisputed). Because the decision identifies the statutes which had been violated and the factual bases for the violation, it sufficiently bridges the analytic gap from evidence to order.⁵

DISPOSITION

The judgment is affirmed. The stay order dated February 10, 2010, is vacated. Respondent is entitled to costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

⁵ Appellants state that their due process rights were "implicated" based on their claim that the Board adopted the ALJ's findings regarding penalty. As explained, the Board's decision, though not a model of clarity, rejected the ALJ's finding regarding penalty and gave specific reasons for its order. Moreover, appellant was permitted the opportunity to present written argument to the Board and took advantage of that opportunity. (Gov. Code, § 11517, subd. (c)(2)(E)(ii) [requiring the agency contemplating rejecting a proposed decision to afford "the parties the opportunity to present either oral or written argument before the agency"].) Appellants demonstrate no due process violation.